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Supreme Court, U.S.
FILED

00152 APR 16 2001

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No. 00-____

IN THE

# Supreme Court of the United States

BALTIMORE SCRAP CORP.,

*Petitioner,*

v.

THE DAVID J. JOSEPH COMPANY, ET AL.,

*Respondents.*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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96 pp

## QUESTIONS PRESENTED

In *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.*, 508 U.S. 49, 61-62 n.6 (1993), this Court expressly left open the question whether the *Noerr-Pennington* doctrine "permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations." The questions presented are:

1. Whether the Fourth Circuit below erred in holding that any fraud exception to *Noerr-Pennington*, if one exists, extends only to fraud that deprives the litigation of its legitimacy—thereby adding to the conflict among the Second, Third, Fifth, Sixth, Ninth, Eleventh, and District of Columbia Circuits as to the existence and scope of a fraud exception.

2. Whether the Fourth Circuit—in direct conflict with the Fifth and Ninth Circuits—erred in holding that *Noerr-Pennington* immunity protects non-parties who conceal their funding and direction of litigation from both the parties and the court and who do not have standing to file suit themselves.

## PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner Baltimore Scrap Corp. was the appellant and plaintiff below. Baltimore Scrap Corp. has no parent corporation, and no publicly held company owns 10% or more of its stock.

Appellees and defendants below and respondents in this Court are The David J. Joseph Company, t/a United Iron & Metal Company; David J. Workum, III; John Does 1-10; I.D. Shapiro; Charles Baum; United Holdings Company, Inc.; United Operating Company, Inc.; and United Investment Enterprises Partnership.

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## PETITION FOR A WRIT OF CERTIORARI

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Baltimore Scrap Corp. ("Baltimore Scrap") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at 237 F.3d 394 and reproduced in the appendix hereto ("App.") at 1a. The opinion of the District Court is reported at 81 F. Supp. 2d 602 and reproduced at App. 19a.

## JURISDICTION

The judgment of the Court of Appeals was entered on January 18, 2001. App. 2a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

## INTRODUCTION

The *Noerr-Pennington* doctrine affords immunity from antitrust liability for activities in the course of petitioning the government for redress, including through litigation. In *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.* ("*PRE*"), 508 U.S. 49 (1993), this Court explained that *Noerr-Pennington* immunity does not extend to litigation that is a sham because it is objectively unreasonable. This Court, however, expressly left open the questions "whether, and, if so, to what extent, *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations." *Id.* at 61-62 n.6. This case presents those questions, which have divided the courts of appeals. In addition, this case presents another important question that has likewise divided the courts of appeals: whether a party that has no right to institute litigation, and

does not in fact do so, may nevertheless obtain the benefit of *Noerr-Pennington* immunity where that party has surreptitiously funded litigation on behalf of other parties.

The decision below has added to the conflict and confusion, which existed to some extent before *PRE*, among the Second, Third, Fifth, Sixth, Ninth, Eleventh, and District of Columbia Circuits as to the existence and scope of a fraud exception to *Noerr*. That conflict and confusion has been recognized by the courts themselves, *see, e.g.*, *Armstrong Surgical Ctr., Inc.* v. *Armstrong County Mem'l Hosp.*, 185 F.3d 154, 163 n.7 (3d Cir. 1999), *cert. denied*, 120 S. Ct. 2716 (2000), by the commentators, *see infra* at 21, and by the Solicitor General, *see* Brief for the United States and the Federal Trade Commission as Amici Curiae at 15, *Armstrong Surgical Ctr.* (No. 99-905). The Fourth Circuit now joins that conflict in a case in which the respondents claim *Noerr-Pennington* immunity from antitrust liability for covertly funding and directing a state court lawsuit—activities they concealed from, and misrepresented to, the parties to the lawsuit and the state courts. The first question presented asks this Court to resolve the question expressly left open in *PRE* and resolve the circuit conflict over the existence and scope of a fraud exception to the *Noerr-Pennington* doctrine.

The second question presented asks this Court to resolve the conflict between the Fourth, Fifth, Sixth, and Ninth Circuits as to whether *Noerr-Pennington* immunity applies to a non-party who does not engage in petitioning through litigation but rather surreptitiously funds and directs litigation by others which the non-party could not itself bring. The Fourth Circuit, in accordance with the Sixth, held in this case that *Noerr-Pennington* immunity extends to such activity even if the non-party would not have standing to file suit and did not do so. The Fourth Circuit recognized that its decision conflicted with a decision of the Fifth Circuit, which held that *Noerr-Pennington* immunity does not extend to such activities when the non-party lacks independent standing to

bring suit on its own. *See* App. 12a. The Ninth Circuit has taken a different approach, holding that *Noerr-Pennington* immunity applies to such activities unless the non-party's fraud deprives the litigation of its legitimacy.

These questions are important and recurring. The time has come for the Court to grant certiorari to resolve the circuit conflicts they have generated.

## STATEMENT OF THE CASE

**1. The Respondents' Intentional Misrepresentations to and Fraud on the Litigants and the State Courts.**[1] In 1991, Baltimore Scrap sought to install and operate a scrap metal shredder in Baltimore. The David J. Joseph Company ("Joseph Co.") possessed a monopoly over the market, as it operated the only scrap metal shredder in town. *See* App. 4a.[2] Shredding companies buy scrap metal, shred it, and sell the processed scrap to steel mills, foundries, and scrap metal brokers. Shredders operate on a narrow profit margin, and competition from another shredder squeezes that narrow margin by driving up the scrap metal price and driving down the price of processed scrap. *See* App. 25a.

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[1] This matter comes before the Court on respondents' successful motion for summary judgment below. Because "the case arrives after a grant of summary judgment to respondent[,]* * * we consider the facts in the light most favorable to petitioner." *Howlett* v. *Birkdale Shipping Co.*, 512 U.S. 92, 94 (1994); *see also Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 332 n.2 (1990) ("Because the case comes to us on review of summary judgment, inferences to be drawn from the underlying facts * * * must be viewed in the light most favorable to the party opposing the motion." (internal citations omitted)); *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962).

[2] The other respondents are the Baltimore manager of the Joseph Co. shredder; the prior owners of the Joseph Co. shredder, who retained a financial interest in the shredder; and individuals and other companies affiliated with the prior owners.

Baltimore Scrap's proposal required zoning approval from the City of Baltimore. A coalition of citizens groups "openly opposed the shredder on environmental grounds." App. 19a. The Joseph Co. also opposed the new shredder—but for different reasons. The Joseph Co. "did not welcome the competition" and "secretly set about to thwart [Baltimore Scrap's] zoning application." App. 20a. Prior to Baltimore Scrap filing the zoning application, the Joseph Co. "was seeking ways to prevent" Baltimore Scrap from becoming a competitor in the Baltimore market. App. 27a. To that end, the Joseph Co.'s Baltimore manager sent a memorandum to a company executive indicating that "[t]hrough connections of I.D. Shapiro [the prior owner of the shredder] and Warren Rich [an attorney representing the company], we are trying to block [Baltimore Scrap's] move to install a new shredder. * * * Warren is handling all of this so as to keep [the Joseph Co.'s] name out of the picture." App. 27a.

Baltimore Scrap filed its first zoning application in September 1991. Respondents and their attorneys contacted several city officials to voice their opposition to Baltimore Scrap's application. The Joseph Co. became concerned about the antitrust implications of these activities and consulted an attorney at the Washington, D.C. law firm Arnold & Porter. The attorney advised the Joseph Co. vice president that "legitimate petitioning of the government was protected by the *Noerr-Pennington* doctrine, but lying and deceit was not." App. 28a. The Baltimore Board of Zoning Appeals ("BMZA") held hearings on Baltimore Scrap's application. A number of individual citizens and citizens groups appeared and testified against the application; the Joseph Co. did not. The BMZA rejected Baltimore Scrap's application. *See* App. 4a, 28a-29a.

In 1992, Baltimore Scrap filed another application with the BMZA that had additional environmental safeguards. Many of the same citizens groups who had opposed the first permit application again testified in opposition. Apparently con-

vinced that the second application had sufficient environmental safeguards, the BMZA granted the permit. *See* App. 29a.

The Joseph Co. was not happy with this decision. I.D. Shapiro, the prior owner with a continuing financial interest, discussed with his attorneys the option of filing an appeal in the company's name. App. 30a. The group "was concerned, however, that an appeal by a competitor, especially one with a spotty environmental track record, would lack credibility." App. 30a. Instead, the group "struck upon the idea" of secretly funding an appeal by the citizens. App. 30a.

Respondents thereupon sought to find a lawyer to handle the appeal by the citizens groups straw parties. I.D. Shapiro first contacted Richard Berndt of the Baltimore law firm Gallagher, Evelius & Jones. *See* Ct. App. J.A. 5972-73, 3955. Shapiro told Berndt that he was interested in appealing the issuance of Baltimore Scrap's permit but that it was essential that he and the Joseph Co. remain "invisible." Ct. App. J.A. 6021-23, 3956. After reviewing the zoning board file on Baltimore Scrap's application, lawyers at the firm advised Shapiro that Baltimore Scrap's "presentation looked good" and that the only thing they could do was "delay" Baltimore Scrap in court by filing an appeal based on the fact that Baltimore Scrap's 1992 application was filed less than a year after its 1991 application. Ct. App. J.A. 6026-29, 3956. Because he wanted to remain "invisible," Shapiro told the lawyers to call an attorney for respondents for the names of the local citizens who would act as straw parties in the appeal. Ct. App. J.A. 6031-35. The next day, Berndt called I.D. Shapiro back and, without explanation, told him to find some other law firm to pursue the appeal. *See* Ct. App. J.A. 6030-31, 3956.

Respondents then turned to Baltimore lawyer David Irwin to file the appeal. *See* Ct. App. J.A. 5709-10. Irwin had no experience in zoning law and had never handled a zoning

appeal in his career. *See* Ct. App. J.A. 5733. Irwin agreed to take the case without reviewing the zoning board file. *See* Ct. App. J.A. 5708-10.

Now respondents needed to find citizens to prosecute the appeal. The respondents would fund the litigation only if they could do so surreptitiously—they wanted to remain "invisible." Ct. App. J.A. 6022-25; *see* App. 4a-5a, 30a. Thus, at respondents' behest, an official of one of Shapiro's affiliated companies, Marlen Trading, approached the president of one of the citizens groups, Gloria Sipes. Respondents chose Sipes because she had spoken in opposition to Baltimore Scrap's zoning application. *See* App. 30a. The Marlen official told Sipes that " 'local businesses' " wanted to fund an appeal and that if interested she should call attorney David Irwin. App. 30a. The official did not identify herself as a representative of Marlen Trading or reveal to Sipes that Marlen Trading was co-owned and controlled by I.D. Shapiro, who also held a financial interest in the Joseph Co. shredder. *See* Ct. App. J.A. 6094-96. Without the covert funding offer, the citizens groups and Sipes would not have had the financial resources to bring an appeal themselves. *See* App. 33a n.16; Ct. App. J.A. 2858. Moreover, evidence that must be credited at this stage of the proceedings confirms that they would have rejected the funding offer had they known the Joseph Co. was behind it. *See* App. 33a n.16.

On August 27, 1992, Irwin filed an appeal on behalf of the citizens groups in the Circuit Court for Baltimore City. The named appellants were three citizens groups; the names of Shapiro and the Joseph Co. did not appear on the papers. *See* App. 31a. On October 13, 1992, Irwin moved to add Gloria Sipes as an individual plaintiff. *See* App. 31a. Baltimore Scrap filed two procedural objections to the appeal. It moved to dismiss the appeal on the ground that the citizens groups lacked standing and opposed Sipes' Motion to Intervene as time-barred. *See* App. 31a. The circuit court denied Balti-

more Scrap's motions but ultimately found on the merits for Baltimore Scrap. *See* App. 31a, 35a.

Respondents were "closely involved" with the citizens' appeal. App. 33a. An attorney for Shapiro and Shapiro himself communicated with Irwin concerning strategies for the case. A member of the firm representing Shapiro forwarded copies of pleadings to Shapiro and noted that "Irwin 'is representing our interest.' " App. 33a. Irwin admitted that he sent most of the pleadings to Shapiro's firm and that the firm was a "resource" in the case. App. 33a. The district court noted that "[i]n contrast, Mr. Irwin did not submit these drafts to Ms. Sipes or the citizens groups for prior approval." App. 33a. Throughout the proceedings, respondents "continued to mask their involvement." App. 33a. Their names never appeared on court papers. The citizens groups were not told who was funding the appeal. Neither the citizens groups nor Sipes were told that Shapiro and his personal attorneys were vetting the pleadings and suggesting strategies. App. 33a-34a.

By pure happenstance, respondents' "cloak of secrecy" began to unravel in March 1993. App. 35a. The Baltimore manager of the Joseph Co., David Workum, intended to fax a copy of a draft motion to stay the circuit court's ruling to one of the attorneys for the company. Workum had obtained the draft from a Shapiro attorney, who had in turn received it from Irwin. *See* App. 36a. The fax was mistakenly sent to a third party, Harry Lenick. Upon receiving the "errant fax," Lenick forwarded it to the president of Baltimore Scrap. App. 35a-36a.

The next day, Irwin, on behalf of the citizens groups, moved to stay the circuit court's ruling. In opposition, Baltimore Scrap drew the court's attention to the "errant fax" and argued that the citizens groups were only acting as "surrogates" for the real parties in interest, the Joseph Co. and persons affiliated with it. App. 36a. In a reply brief,

Irwin stated: " '[Joseph Co.] is not, openly or under the table, the real party in interest in this case, and has in no way enlisted Appellants to serve as [the Joseph Co.'s] stalking horse to prosecute the appeal of the Board's decision.' " App. 36a. The circuit court denied the motion to stay and noted that it perceived the "hand of the [respondents]" in the appeal and that respondents had "gone from the role of an interested observer to the role of an active participant." App. 37a-38a (internal citations omitted).

Shortly after the transmission of the errant fax, the Joseph Co. again contacted its antitrust counsel at Arnold & Porter, Richard Wertheimer. *See* Ct. App. J.A. 6203-10, 4292. Wertheimer told another lawyer for respondents, Sam Wood, that "Irwin has an ethical obligation to disclose to Sipes the identity of the party who is paying his legal bills in this matter." Ct. App. J.A. 4169. Wood told Wertheimer that "Irwin is not inclined to disclose this information." Ct. App. J.A. 4169. Wertheimer urged Wood "to check the Rules of Professional Responsibility and suggest to Irwin that he make accurate disclosure." Ct. App. J.A. 4169. Wertheimer also advised respondents not to appeal the circuit court's ruling to the Court of Special Appeals:

> Wertheimer[] * * * wouldn't be sorry to see us drop the issue. The covert nature of our involvement through Marlin [sic] Trading is not typical [Joseph Co.] style and, he believes, not becoming of our position in the industry. We are just too big and this kind of behind-the-scenes activity could easily become an embarrassment.
>
> * * *
>
> Wertheimer realizes we must make our decision based on commercial issues and that much is at stake. If we must oppose the shredder, he'd rather we do it in the open—although he would really like to see us withdraw now, before Simon [the president of Baltimore Scrap] incurs any real economic injury. [Ct. App. J.A. 4303.]

Respondents ignored Wertheimer's advice and told Irwin to file an appeal to the Court of Special Appeals. *See* Ct. App. J.A. 1762-63. Irwin filed the Notice of Appeal before even consulting with the citizens groups to obtain approval to proceed in their names. *See* Ct. App. J.A. 1762-63, 5742-57.

In early April 1993, Irwin met with the citizens groups and Sipes and informed them of the involvement of respondents in funding the appeal. At least some of the groups' leaders were "upset" and "disappointed" about the identity of their covert benefactors. App. 37a. Sipes testified at her deposition that she would never have participated in the appeal had she known that the Joseph Co. was paying Irwin's fees: "Number one, like I said before, if I'd known United Iron & Metal [the Joseph Co.] was involved, I would never have accepted the check or even the offer." Ct. App. J.A. 6151. At her deposition, Sipes also testified that prior to Irwin's disclosure she had no idea that the Joseph Co. was involved in her appeal: "[W]e were all very surprised because we never dreamed that [the Joseph Co.] * * * was involved. * * * I was naïve enough to think that it was just what she [the Marlen Trading official] said, people in our area, you know, businesses in our area." Ct. App. J.A. 6117.

The citizens groups and Sipes ultimately decided to press on with the appeal. App. 37a. In January 1994—sixteen months after the zoning lawsuit was filed—the Maryland Court of Special Appeals held that the case was " 'dead on arrival in circuit court' " because the citizens groups lacked standing and the motion to intervene by Sipes was time-barred. App. 38a (quoting opinion of the Court of Special Appeals). The court remanded with orders to dismiss.

**2. District Court Proceedings.** In 1996, Baltimore Scrap filed a complaint against the Joseph Co. and the other respondents. The complaint alleged the following counts: (1) antitrust violations of Section 1 of the Sherman Act; (2) violations of Maryland antitrust law; (3) malicious use of

process; (4) abuse of process; (5) tortious interference with prospective advantage; (6) fraud; and (7) conspiracy. *See* App. 39a. Following discovery, respondents moved for summary judgment, and the district court granted that motion on the basis of *Noerr-Pennington* immunity. *See* App. 39a, 57a.

Although the district court found respondents' actions "deceitful[,]" "underhanded[,]" "unseemly," and "morally wrong," it concluded that those actions were protected by *Noerr-Pennington*. App. 21a, 50a. The district court held that under *Noerr-Pennington*, "[a]bsent aggravating 'plus factors,' a party, even with anti-competitive intent, may provide clandestine support for litigation instigated by another party without incurring liability." App. 41a. Baltimore Scrap argued that respondents' actions fell within two exceptions to *Noerr-Pennington* immunity—sham litigation and litigation based on fraud.

The district court applied the *PRE* two-part test for sham litigation, rejecting Baltimore Scrap's arguments that the state court litigation was objectively baseless. *See* App. 42a. On the fraud issue, the district court first reasoned that this Court has noted that " '[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process.' " App. 47a-48a (quoting *California Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508, 512 (1972)). The district court then noted that the "*PRE* Court took pains to leave open whether *Noerr* permits imposition of antitrust liability due to fraud, absent sham litigation" and that "[s]ubsequent to *PRE*, lower courts have grappled with the meaning of the fraud exception." App. 48a-49a.

The district court found most persuasive the Ninth Circuit's analysis of the fraud issue. It noted that the Ninth Circuit had read *PRE*'s footnote six to mean that "a defendant's fraudulent behavior will strip it of *Noerr* immunity if there is 'deceptive conduct which goes to the core of a lawsuit's

legitimacy.' " App. 49a (quoting *Liberty Lake Invs., Inc.* v. *Magnuson*, 12 F.3d 155, 158 (9th Cir. 1993), *cert. denied*, 513 U.S. 818 (1994)). Baltimore Scrap argued that respondents' actions constituted fraud on the state courts, the citizens groups, the plaintiffs, and the BMZA. *See* App. 50a-55a. The district court held, however, that respondents' actions "did not rise to the level of fraud necessary to vitiate *Noerr* immunity." App. 50a.[3]

**3. The Court of Appeals Decision.** Baltimore Scrap appealed to the Fourth Circuit, arguing that the *Noerr-Pennington* doctrine did not apply to this case because that doctrine protects litigants but not third parties who covertly fund and direct a lawsuit and, alternatively, that the fraud and sham litigation exceptions operated to strip respondents of any *Noerr-Pennington* immunity. *See* App. 9a, 11a.

The Fourth Circuit rejected Baltimore Scrap's argument that *Noerr-Pennington* applies only to litigants, not third parties who covertly fund the litigation and do not themselves petition the courts. *See* App. 11a. The Court recognized that its decision conflicted with the Fifth Circuit's decision in *In re Burlington Northern, Inc.*, 822 F.2d 518 (5th Cir. 1987), *cert. denied*, 484 U.S. 1007 (1988), which held that *Noerr-Pennington* did not apply to those who lacked independent standing to sue but instead covertly encouraged and assisted the lawsuits of others. *See* App. 12a. The Fourth Circuit found that it did not need to decide whether respondents had independent standing to pursue the zoning litigation "because the standing of third parties does not control the sham litigation analysis." App. 12a-13a.

On the issue of a fraud exception, the Fourth Circuit began its analysis by noting that, in *PRE*, this Court had "specifically left open the question of whether a fraud exception to

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[3] The district court also held that *Noerr-Pennington* immunity protected respondents' actions from the state antitrust and common law claims. *See* App. 56a-57a.

*Noerr-Pennington* exists." App. 14a. It then found that "[i]f a fraud exception to *Noerr Pennington* does exist, it extends only to the type of fraud that deprives litigation of its legitimacy." App. 14a. The court relied on opinions from the Third and Ninth Circuits. *See* App. 14a (citing *Cheminor Drugs, Ltd.* v. *Ethyl Corp.*, 168 F.3d 119 (3d Cir.), *cert. denied*, 528 U.S. 871 (1999); *Liberty Lake*, 12 F.3d at 158-159). The Fourth Circuit held that respondents' actions were not within the scope of the fraud exception to *Noerr-Pennington*, assuming one existed, because Baltimore Scrap could not show that the state court judgment was procured by fraud or deceit to bring it within this understanding of the scope of any fraud exception. App. 14a.[4]

## REASONS FOR GRANTING THE WRIT

### I. THE COURT SHOULD RESOLVE THE CIRCUIT CONFLICT AND CONFUSION OVER THE EXISTENCE AND SCOPE OF A FRAUD EXCEPTION TO *NOERR-PENNINGTON* IMMUNITY

The petition should be granted because it involves an important question of federal law expressly left open by this Court: "whether and, if so, to what extent, *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations." *PRE*, 508 U.S. at 61-62 n.6. This important question has divided the courts of appeals, and the Fourth Circuit's decision directly conflicts with the decisions of other circuit courts. *See* S. Ct. Rule 10(a). The Court should not allow this conflict and confusion to persist.

The *Noerr-Pennington* doctrine protects those who exercise their First Amendment right to petition the government for a redress of grievances from suit under the antitrust laws. *See California Motor Transp.*, 404 U.S. at 510; *United Mine Workers of Am.* v. *Pennington*, 381 U.S. 657, 669 (1965);

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[4] The court also found that the sham exception to *Noerr-Pennington* did not apply in this case. *See* App. 9a-11a.

*Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961). This immunity from suit, however, is not absolute. The doctrine does not protect petitioning activities that are " 'a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and [where] the application of the Sherman Act would be justified.' " *California Motor Transport*, 404 U.S. at 511 (quoting *Noerr*, 365 U.S. at 144).

After a long period in which the courts of appeals struggled to define the sham exception, the *PRE* Court enunciated a two-part definition of sham litigation. That definition asks whether a lawsuit is objectively baseless and, if so, whether the litigation was undertaken to interfere directly with the business relationships of a competitor. *See PRE*, 508 U.S. at 60-61.[5]

After defining the sham exception, the *PRE* Court expressly left open the question of the existence and scope of a fraud exception to *Noerr-Pennington* immunity:

> In surveying the "forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations," we have noted that "unethical conduct in the setting of the adjudicatory process often results in sanctions" and that "[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." *California Motor Transport*, 404 U.S., at 512-513 * * *. *We need not decide here whether and, if so, to what extent,* Noerr *permits the imposition of antitrust liability for*

[5] If a plaintiff defeats a defendant's claim of *Noerr-Pennington* immunity by demonstrating first the objective and then the subjective components of a sham, the plaintiff must still prove a substantive antitrust violation. *See PRE*, 404 U.S. at 61 ("Proof of a sham merely deprives the defendant of immunity; it does not relieve the plaintiff of the obligation to establish all other elements of his claim."). The same would be true of any fraud exception.

> *a litigant's fraud or other misrepresentations.* [508 U.S. at 61-62 n.6 (emphasis added; citation omitted).]

That remaining question is the one presented here. It has generated confusion and conflict in the circuit courts.

In his amicus brief in response to this Court's invitation in *Armstrong Surgical Center*, the Solicitor General noted that this Court's opinions prior to *PRE* provided some support for answering the open question in *PRE* in favor of a fraud exception to *Noerr-Pennington* immunity.[6] *See* Brief for the United States and the Federal Trade Commission as Amici Curiae at 11-12 (finding support in this Court's opinions for the contention that "the Sherman Act should reach the conduct of defendants who restrain competition by conspiring to 'corrupt administrative or adjudicative proceedings * * * by making deliberate misrepresentations * * * for the purpose of poisoning the outcome of the proceedings' ").

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[6] Commentators have also found support in this Court's jurisprudence for a fraud exception to *Noerr-Pennington* immunity. *See* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶¶ 203e, 205c2, at 169, 230-232 (2d ed. 2000); Robert H. Bork, *The Antitrust Paradox* 358-359 (1978) ("Access to judicial and administrative processes may be a constitutional right, but there is no constitutional right to make deliberate misrepresentations to such tribunals * * * for the ultimate purpose of wreaking economic injury upon a competitor."); Scott Filmore, Comment, *Defining the Misrepresentation Exception to the* Noerr-Pennington *Doctrine*, 49 U. Kan. L. Rev. 423, 424 (2001) ("[W]hile misrepresentations to the government probably would have fallen into the sham exception before *Professional Real Estate Investors*, this decision left the validity of such conduct in an uncertain state."); Gary Myers, *Antitrust and First Amendment Implications of* Professional Real Estate Investors, 51 Wash. & Lee L. Rev. 1199, 1229-30 (1994) ("Fraud or misrepresentations committed during or in connection with litigation should be treated under a separate analysis. * * * [I]f an antitrust plaintiff has a factual basis for asserting that misrepresentations were used as part of a predatory litigation strategy, the plaintiff may be able to avoid application of the two-part sham test announced in *Professional Real Estate Investors*.").

As noted by the Solicitor General, *see id.*, many of this Court's decisions support a fraud exception, particularly for misrepresentations made during litigation. For example, in *California Motor Transport*, the Court observed that there are "forms of illegal and reprehensible practice," including "[m]isrepresentations," that may "corrupt the administrative or judicial processes" and "result in antitrust violations." 404 U.S. at 513; *see also id.* at 517 (Stewart, J., concurring in the judgment) (distinction between legislative and administrative or judicial body "might make a difference in the applicability of the antitrust laws if the petitioners made misrepresentations of fact or law to these tribunals, or had engaged in perjury, or fraud, or bribery"). Likewise, in *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U.S. 492, 504 (1988), the Court noted that "[a] misrepresentation to a court would not necessarily be entitled to the same antitrust immunity allowed deceptive practices in the political arena * * *." Finally, both *PRE* and *California Motor Transport* cited this Court's decision in *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172, 177-178 (1965), which held that proof that a patent-holder "obtained the patent by knowingly and willfully misrepresenting facts to the Patent Office * * * would be sufficient to strip [the holder] of its exemption from the antitrust laws" for any "injurious consequences * * * of the patent's enforcement."

While recognizing this precedent favoring a fraud exception to *Noerr-Pennington* immunity, the courts of appeals have struggled with its existence because of the lack of a definitive statement by this Court. This confusion over the existence of a fraud exception has caused conflict among the courts of appeals as to the scope and definition of such an exception. The Fifth, Eleventh, and D.C. Circuits have found a fraud exception to *Noerr-Pennington* immunity for misrepresentations made during the adjudicatory process. The Fourth and Ninth Circuits will apply a fraud exception only if

the fraud on the court deprives the litigation of its legitimacy. The Second and Sixth Circuits have held that unethical conduct within the adjudicatory process should be analyzed under the sham exception to *Noerr*. The Third Circuit is internally divided on the existence and scope of a fraud exception, with two separate panels issuing conflicting rulings within four months of each other.

1. Three circuits have found a freestanding exception to the *Noerr-Pennington* doctrine that applies generally to fraudulent conduct in connection with litigation or other government proceedings. In *Woods Exploration & Producing Co.* v. *Aluminum Co. of Am.*, 438 F.2d 1286, 1298 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972), the Fifth Circuit held that *Noerr* did not protect the filing of false production forecasts with a state regulatory commission. As the court concluded, such "abuse of the administrative process" does not "justify antitrust immunity." *Id.*

The Eleventh Circuit similarly found *Noerr-Pennington* immunity inapplicable when misrepresentations were made to a governmental agency acting in an adjudicative capacity. *See St. Joseph's Hosp., Inc.* v. *Hosp. Corp. of Am.*, 795 F.2d 948, 955 (11th Cir. 1986). The Court held that "[m]isrepresentations under these circumstances do not enjoy *Noerr* immunity," and that "the furnishing of misinformation" to an adjudicative body is "not entitled to the same protection" as legitimate litigation tactics. *Id.*

The D.C. Circuit likewise has found *Noerr-Pennington* inapplicable to situations involving misrepresentations in the adjudicatory process. *See Whelan* v. *Abell*, 48 F.3d 1247, 1255 (D.C. Cir. 1995) (analyzing *Noerr* in the context of a tort case claiming abuse of process and malicious prosecution). The court found that "[h]owever broad the First Amendment right to petition may be, it cannot be stretched to cover petitions based on known falsehoods." *Id.* The court then cited *California Motor Transport*, *PRE*, and the Ninth

Circuit's decision in *Liberty Lake* for the proposition that the two-part sham test is inapplicable when there is knowing fraud or intentional misrepresentation. *See id.*

2. The Fourth Circuit, in the case at bar, took a different approach. It held that if a separate fraud exception to *Noerr* does exist, it "extends only to the type of fraud that deprives litigation of its legitimacy." App. 14a. In the Fourth Circuit, if a "judgment is not procured by fraud or deceit, it cannot fall within any fraud exception to *Noerr-Pennington*." App. 14a.

The Fourth Circuit relied on decisions from the Third and Ninth Circuits to support its understanding of the scope of the fraud exception. *See* App. 14a (quoting *Cheminor Drugs*, 168 F.3d at 123-124; *Liberty Lake*, 12 F.3d at 158-159). The Third Circuit position—discussed below—is in fact unsettled. *See infra* at 19-20. The Ninth Circuit has held that "in the context of a judicial proceeding, if the alleged anticompetitive behavior consists of making intentional misrepresentations to the court, litigation can be deemed a sham if 'a party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy.' " *Kottle* v. *Northwest Kidney Ctrs.*, 146 F.3d 1056, 1060 (9th Cir. 1998), *cert. denied*, 525 U.S. 1140 (1999) (quoting *Liberty Lake*, 12 F.3d at 158 and citing *Clipper Exxpress* v. *Rocky Mtn. Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1260 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983)). In the Ninth Circuit, fraud and misrepresentation constitute a separate "categor[y]" of the sham exception—if a court finds such fraud, the two-part *PRE* sham litigation test does not apply. *Id.* at 1061.[7]

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[7] Thus, the law of the Ninth Circuit (akin to the approach of the Second and Sixth Circuits discussed below) views fraud in a judicial proceeding in the context of the sham litigation exception to *Noerr-Pennington* immunity. *See Kottle*, 146 F.3d at 1060. Unlike other circuits, however, the Ninth Circuit has developed a separate test for such claims.

3. Other circuits apply still another test, considering claims of fraud under the general test for sham litigation. The Second Circuit, interpreting *California Motor Transport*, has held that " 'unethical conduct in the setting of the adjudicatory process' " falls within the sham exception to *Noerr-Pennington*. *Landmarks Holdings Corp.* v. *Bermant*, 664 F.2d 891, 896 (2d Cir. 1981) (quoting *California Motor Transp.*, 404 U.S. at 512); *see Juster Assocs.* v. *City of Rutland*, 901 F.2d 266, 271 (2d Cir. 1990) (citing with approval *Landmarks Holdings*). The court held that *California Motor Transport* "expanded" the sham exception, stating that "unethical conduct in the setting of the adjudicatory process" cannot "seek refuge under the *Noerr-Pennington* doctrine since [it] constitute[s] an abuse of process effectively barring * * * access to the agencies and courts." *Landmarks Holdings*, 664 F.2d at 896. In the Second Circuit, the "abuse of the administrative and judicial process through unethical lawyer conduct * * * is unprotected by the *Noerr-Pennington* immunity." *Id.*

The Sixth Circuit has also interpreted *California Motor Transport* as holding that "unethical conduct in the setting of the adjudicatory process" falls within the sham exception to *Noerr-Pennington* because "such conduct constitutes an abuse of [governmental] process * * * effectively barring a competitor's meaningful access to the courts or agencies." *Potters Med. Ctr.* v. *City Hosp. Ass'n*, 800 F.2d 568, 578 (6th Cir. 1986). The Sixth Circuit held that "knowingly false submissions or intentional misrepresentations constitute an abuse of government process, analogous to the antitrust violation that occurs when one procures a patent through fraud on the patent office." *Id.* at 580.

4. The law of the Third Circuit is even more muddled. That Circuit in two separate 1999 cases came to different conclusions as to the existence and scope of a fraud exception. *See Armstrong Surgical Ctr.*, 185 F.3d at 160; *id.* at 164 (Schwartz, J., dissenting) (noting the conflict between

the two panels on the fraud exception issue); *Cheminor Drugs*, 168 F.3d at 123. In *Cheminor Drugs*, the Third Circuit first noted that *PRE* left open the fraud exception question and then held that misrepresentations that "infect the core" of the defendant's claim and the government's resulting actions are not entitled to *Noerr-Pennington* immunity under the objectively baseless prong of the sham exception outlined in *PRE*. *See Cheminor Drugs*, 168 F.3d at 123-124; *accord Armstrong Surgical Ctr.*, 185 F.3d at 170-171 (Schwartz, J., dissenting) (adopting this interpretation of *Cheminor*).

Four months later, another Third Circuit panel appeared to reverse *Cheminor*'s definition of a fraud exception. In *Armstrong*, the majority acknowledged this Court's suggestion of a fraud exception in *California Motor Transport*, but concluded that "injuries that are inflicted by states acting as regulators" do not give rise to liability under the Sherman Act "even where it is alleged that a private party urging the action did so by bribery, deceit or other wrongful conduct that may have affected the decision making process." *Armstrong Surgical Ctr.*, 185 F.3d at 162.[8] Thus, at the present time, the Third Circuit is itself internally divided as to the existence and scope of a fraud exception.

5. The above discussion of the circuit courts' approaches to the fraud exception issue evidences the confusion

[8] In fashioning its holding, the majority in *Armstrong* relied heavily on this Court's decision in *City of Columbia* v. *Omni Outdoor Adver., Inc.*, 499 U.S. 365, 368 (1991), a case involving lobbying for the passage of zoning ordinances. *Omni*'s statements on the relevance of deception to *Noerr* immunity arose in the legislative context and thus are inapplicable to a fraud exception in the context of litigation. *See Armstrong Surgical Ctr.*, 185 F.3d at 167 (Schwartz, J. dissenting); Areeda & Hovenkamp, *supra*, ¶ 205c2, at 230-231 ("We would therefore disagree with the Third Circuit's analysis in *Armstrong*, which dealt with a claim of false information submitted in an essentially adjudicatory setting as if it were no different from false information submitted in a legislative setting.").

and conflict over its existence and scope. Some circuits have recognized a separate fraud exception to *Noerr-Pennington* immunity in the litigation context (or considered *Noerr* inapplicable to misrepresentations). Some circuits have treated misrepresentations as falling within the sham exception, thereby possibly subjecting them to the two-part sham litigation test. In addition, the circuits have divided over the level and materiality of fraud or misrepresentation required.

The Third Circuit, in analyzing the existence and scope of a fraud exception, has noted on multiple occasions the conflicts among the circuits. *See Armstrong Surgical Ctr.*, 185 F.3d at 163 n.7 (acknowledging conflict between the Third Circuit's approach and that of the Sixth, Ninth, and Eleventh Circuits); *Cheminor Drugs*, 168 F.3d at 131 (Sloviter, J., dissenting) (finding conflict between Third Circuit's approach and that of the Ninth and D.C. Circuits). The Solicitor General also has found tension between the circuits as to reasoning and result. *See* Brief for the United States and the Federal Trade Commission as Amici Curiae at 14-15, *Armstrong Surgical Ctr.* (No. 99-905).

Moreover, commentators discussing the existence and scope of a fraud exception have noted the conflict among the circuits and the need for clarification from this Court. *See* Filmore, *supra*, at 425 ("Each federal appellate court that has addressed a misrepresentation exception claim has developed a different approach."); *id.* at 456 ("The Supreme Court has never directly addressed the exception and, after the Court decided *Professional Real Estate Investors*, the circuit courts have taken conflicting approaches on the issue."); Paul Gowder, *Antitrust: Third Circuit Rejects Exception to* Noerr-Pennington *Doctrine Creating Split Among Circuits*, 27 J.L. Med. & Ethics 278, 279 (1999) ("In rejecting the exception of misrepresentation to administrative agencies, *Armstrong* creates a split among the circuits. Until the U.S. Supreme Court resolves whether the exception to the doctrine is valid, the doctrine will be interpreted inconsistently throughout the

United States."); Myers, *supra*, at 1229, 1234 ("Although the Court in *Professional Real Estate Investors* announced a two-part test for litigation behavior generally, it expressly did not deal with situations involving litigation fraud or other unethical conduct. * * * [T]he contours of the fraud exception to *Noerr-Pennington* remain unclear.").

This confusion and conflict in the law is intolerable and should be resolved by this Court. In this case, respondents both misrepresented to the state court their role as masterminds of the zoning litigation and concealed that role from the court and the plaintiffs. Yet despite conduct the trial court found "deceitful" and "morally wrong," the Fourth Circuit (following the Ninth) held that respondents enjoyed absolute antitrust immunity because their fraud, in the court's view, did not deprive the litigation of its legitimacy. The court so held even though the record reveals that but for the fraud, the litigation would not have occurred at all—members of the citizens groups could not fund the appeal themselves and they did not want their claims controlled by a company engaging in the very activities they sought to stop. *See supra* at 7, 10.[9] By contrast, the Fifth, Eleventh, and D.C. Circuits recognize a freestanding fraud exception that does not contain the Fourth Circuit's limiting requirement, and the Second and Sixth Circuits analyze such claims under a sham litigation test. And the Third Circuit, at least in its most recent decision, recognizes no fraud exception at all. The Court should not allow this conflict to persist further. *See* S. Ct. Rule 10(a); *Braxton* v. *United States*, 500 U.S. 344, 347 (1991) ("A principal purpose for which we use our certiorari jurisdiction * * * is to resolve conflicts among the United States courts of appeals").

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[9] Over the years, community and environmental groups had "lodged repeated complaints about excessive noise and pollution" created by the Joseph Co. shredder. App. 26a.

## II. THE COURT SHOULD RESOLVE THE CIRCUIT CONFLICT AND CONFUSION OVER WHETHER *NOERR-PENNINGTON* IMMUNITY APPLIES TO NON-PARTIES WHO COVERTLY FUND AND DIRECT LITIGATION THEY COULD NOT BRING THEMSELVES

This case presents a second issue on which the lower courts also need guidance: whether *Noerr-Pennington* immunity applies to non-parties, who do not themselves have standing to file a lawsuit, but who covertly fund and direct litigation by others. The courts of appeals are divided on this question of law. In this case, respondents covertly financed and directed the state zoning litigation in the name of the plaintiff citizens groups. *See* App. 20a. Neither the citizens groups plaintiffs nor the state courts knew of the involvement of respondents—direct competitors of Baltimore Scrap who vehemently opposed the construction of a new metal shredder in the area. *See* App. 31a. The Fourth and Sixth Circuits are largely in agreement that *Noerr* protects this type of activity. They are in direct conflict with the Fifth Circuit, which has held that *Noerr* does not apply when the covert actors do not have standing to file suit themselves. All three circuits are in conflict with the Ninth Circuit, which has taken a position between that of the Fourth and Sixth, on the one hand, and the Fifth, on the other.

The Fourth Circuit held that *Noerr-Pennington* immunity protected respondents' covert activity. *See* App. 11a. The court found that the "standing of third parties does not control the sham litigation analysis" because "[f]unding of litigation by a non-party can be petitioning to the same extent that filing a lawsuit itself is petitioning." App. 12a-13a.[10] In

[10] The District Court found that, as a taxpayer, the Joseph Co. would have had standing to appeal the BMZA decision to the Circuit Court for Baltimore City. *See* App. 30a. *But see Committee for Responsible Dev. on 25th Street* v. *Mayor & City Council of Baltimore*, 767 A.2d 906 (Md. Ct. Spec. App. 2001) (holding that status as a taxpayer does not confer standing to appeal a zoning board decision but rather person must be "aggrieved by Board's

reaching this holding, the court noted that it would not rely on the Fifth Circuit's approach to the issue. *See* App. 12a. The Sixth Circuit has similarly held that *Noerr-Pennington* protects covert funding of and involvement in a lawsuit absent a showing of abuse of process or the "repetitive, harassing filing of meritless claims." *See City of Cleveland* v. *Cleveland Elec. Illuminating Co.*, 734 F.2d 1157, 1161-63 (6th Cir.), *cert. denied*, 469 U.S. 884 (1984).

In so holding, the Fourth and Sixth Circuits are in direct conflict with the Fifth. *In re Burlington Northern, Inc.*, 822 F.2d 518 (5th Cir. 1987), *cert. denied*, 484 U.S. 1007 (1988), like the case at bar, involved a non-party—Union Pacific—which did not seek to join the litigation directly but rather covertly provided legal assistance to one of the named parties. Most of the named parties and the district court itself were unaware of Union Pacific's assistance. *See id.* at 530-531. The Fifth Circuit held that "it would be an unwarranted extension of *Noerr-Pennington*'s protection to hold that a party without an interest in a case sufficient to allow it to directly petition the courts may nonetheless indirectly seek its anticompetitive goals through encouraging and assisting the lawsuits of others." *Id.* at 531. As the court noted, because "a person whose interest in a controversy is not sufficient to confer standing has no right to petition the court as a party and obtain relief," such a person "cannot reasonably claim that his participation in a lawsuit in which he has no standing is a genuine attempt to influence governmental decision-making." *Id.* at 530. As the court held, the same is neces-

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decision"); *Eastern Serv. Ctrs., Inc.* v. *Cloverland Farms Dairy, Inc.*, 744 A.2d 63, 67 (Md. Ct. Spec. App. 2000) ("In Maryland, a person whose sole reason for appealing a decision from the Zoning Board is to prevent competition with his established business does not have standing."). The Fourth Circuit stated that it did not need to decide whether respondents would have had standing to appeal the BMZA's zoning decision, "because the standing of third parties does not control the sham litigation analysis." App. 12a-13a.

sarily true when non-parties surreptitiously control litigation they could not bring on their own behalf. *See id.* at 530-531. Thus, in the Fifth Circuit, third parties without independent standing do not enjoy *Noerr-Pennington* protection for the types of activities undertaken by the respondents in this case.

The Ninth Circuit's position on this issue lies between the positions of the Fourth and Sixth Circuits, on the one hand, and the Fifth Circuit, on the other. *Liberty Lake* involved a non-party's prompting and financing of a lawsuit by concerned local businesses and individuals in order to fight a zoning permit issued to a potential competitor. *See Liberty Lake*, 12 F.3d at 156, 159. The court read *PRE*'s footnote six to require application of the two-part sham litigation test to such activity in the "absence of proof that a party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy." *Id.* at 159. Because *Liberty Lake* did not involve either the covert funding and direction of the litigation or the misrepresentations or fraud that pervaded the case at bar, the court applied the two-part sham litigation test. *See id.* at 157-159.

While the Fifth Circuit has held that *Noerr* is inapplicable where the non-party does not have standing and the Fourth and Sixth Circuits have held that *Noerr* is applicable regardless of standing, the Ninth Circuit has found *Noerr* applicable (and will apply the sham litigation test) only in the absence of proof of intentional misrepresentation or knowing fraud. There is a direct conflict among the circuits as to the applicability in the litigation context of *Noerr-Pennington* to non-parties without independent standing who instead covertly fund and direct litigation. Some circuits, like the court below, permit such non-parties to gain the benefit of the immunity bestowed by *Noerr-Pennington* for petitioning activities even though those non-parties could not, and did not, actually petition the courts, while the Fifth Circuit has held to the contrary. The application of the antitrust laws should not continue to depend on the happenstance of where

a case arises, and the Court should therefore grant certiorari to resolve the conflict on this important, recurring issue.

## III. THIS CASE INVOLVES TWO RECURRING QUESTIONS OF NATIONAL IMPORTANCE

The conflicts among the circuit courts on the two questions presented in this petition provide an important basis for this Court's review, but the need for certiorari is heightened by the important, recurring issues of national importance implicated by those questions. The covert funding and direction of litigation—and the accompanying fraud upon the court and the parties—threatens to corrupt *Noerr-Pennington* immunity and undermine the sham exception to *Noerr*.

The *Noerr-Pennington* doctrine provides immunity from antitrust liability for petitioning activities, but this immunity is far from absolute.[11] Just as sham litigation does not warrant antitrust immunity because it is "actually nothing more than an attempt to interfere directly with the business relationships of a competitor," litigation based upon fraud also corrupts the right to petition for anti-competitive gain. *Noerr*, 365 U.S. at 144. Thus, "[i]ntentional fraud on state courts or administrative tribunals can lay only a modest claim to the mantle of immunity that *Noerr* and its progeny cast around more legitimate, or more clearly political, 'petitioning' conduct." Brief of Solicitor General at 19; *accord Armstrong Surgical Ctr.*, 185 F.3d at 167-168 (Schwartz, J., dissenting) ("[T]he Supreme Court has broadly hinted *Noerr-Pennington* immunity is not intended to shield petitioning activities that do not further, but rather distort, the decision-

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[11] *See PRE*, 508 U.S. at 56 (noting lack of immunity for sham petitioning); *McDonald* v. *Smith*, 472 U.S. 479, 484 (1985) ("Nor do the Court's decisions interpreting the Petition Clause in contexts other than defamation indicate that the right to petition is absolute."); Areeda & Hovenkamp, *supra*, ¶ 201a, at 146; Bork, *supra*, at 351 ("The *Noerr* case, however, did not say or imply that any attempt to get any government official to do anything was beyond the reach of the Sherman Act or other legal sanctions.").

making process in the non-legislative context."); Bork, *supra*, at 347 ("Predation by abuse of governmental procedures, including administrative and judicial processes, presents an increasingly dangerous threat to competition."); James D. Hurwitz, *Abuse of Governmental Processes, the First Amendment, and the Boundaries of* Noerr, 74 Geo. L.J. 65, 109 (1985) ("Willful misrepresentation purposefully distorts the process it invokes."); *cf. McDonald*, 472 U.S. at 484 ("[W]e are not prepared to conclude, 140 years later, that the Framers of the First Amendment understood the right to petition to include an unqualified right to express damaging falsehoods in exercise of that right.").

Misrepresentations and fraud are dangerous to the adjudicative process because of the reliance of courts on information provided by the parties:

> [T]he adjudicatory sphere is much different from the political sphere. There is an emphasis on debate in the political sphere, which could accommodate false statements and reveal their falsity. In the adjudicatory sphere, however, information supplied by the parties is relied on as accurate for decision making and dispute resolving. *The supplying of fraudulent information thus threatens the fair and impartial functioning of these agencies and does not deserve immunity from the antitrust laws.* [*Clipper Exxpress*, 690 F.2d at 1261 (emphasis added).]

Courts do not have the time and resources to conduct independent investigations. *See id.* at 1262. The circuit court conflict over the existence and scope of a fraud exception to *Noerr* should be resolved by this Court, because fraud and misrepresentation in litigation threaten the integrity and impartiality of the courts.

Moreover, covert funding and direction of litigation by non-parties who do not have standing not only undermines the constitutional and prudential requirements of standing, but also extends *Noerr-Pennington*'s limited immunity for

legitimate petitioning activities to those who cannot, and do not, engage in such activities. *See FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 231 (1990) ("The federal courts are under an independent obligation to examine their own jurisdiction, and 'standing is perhaps the most important of the jurisdictional doctrines.' ") (quoting *Allen* v. *Wright*, 468 U.S. 737, 750 (1984)). The Fourth Circuit in the instant case, in conflict with other circuits, found that non-parties who do not have standing to litigate cases can effectively function as rightful parties to the litigation. The court did so under the mantle of the right to petition, yet respondents in this case could not lawfully petition the courts in this matter. As applied to litigation, the *Noerr-Pennington* doctrine is a limited immunity from antitrust liability necessary to protect the right of parties to petition the courts for relief; it should not be turned into a sword that permits parties who have no right to petition the courts to engage in anticompetitive activities with impunity. The Fourth Circuit's holding is a corruption of both *Noerr-Pennington* and the standing requirement, and the circuit court conflict on this important issue should not be allowed to stand.

While fraudulent litigation corrupts *Noerr-Pennington* immunity, it also threatens the sham exception to *Noerr*. As a result of much confusion and conflict in the lower courts, *PRE* sought to clarify the definition of sham litigation. *See PRE*, 508 U.S. at 51, 55. The denial of a fraud exception or the analysis of fraud under the sham litigation exception puts at risk the precise sham definition set forth in *PRE*. Although particular litigation may without fraud be objectively baseless, a party's misrepresentations to the court may provide an objective basis for making the claim. *See* Filmore, *supra*, at 445-446. Moreover, under *PRE*, a winning lawsuit is never a sham. *See PRE*, 508 U.S. at 60 n.5 ("A winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham."). But fraud might turn a losing lawsuit into a winning lawsuit, thereby

providing antitrust immunity under *PRE*. *See Cheminor Drugs*, 168 F.3d at 131 (Sloviter, J., dissenting); Filmore, *supra*, at 446. That is what happened here, where respondents' deceit permitted them to finance and control a lawsuit which would not have been financed at all had respondents revealed the truth. Fraud is eroding the efforts in *PRE* to clarify and unify the definition of sham litigation.

A definitive statement from this Court will also clarify for attorneys what constitutes lawful representation of clients in these and similar circumstances. The case at bar implicates the professional and ethical liability of attorneys. The district court and the Fourth Circuit suggested that the attorney who represented the plaintiffs in the state zoning litigation (and who accepted the covert funds and direction of respondents in this case) may have violated multiple provisions of the state rules of civil procedure and code of professional responsibility. *See* App. 17a.[12]

Guidance is needed from this Court to protect both the integrity of *Noerr* immunity and the courts as well as the legal profession's ethical and professional standards. This Court should grant review of the decision below to resolve the confusion and conflict among the circuits on the applicability of *Noerr-Pennington* to non-parties and on the existence and scope of a fraud exception to *Noerr-Pennington* immunity—a question expressly left open by this Court in *Professional Real Estate Investors*.

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[12] The Fourth Circuit suggested possible violations of, *inter alia*, Md. R. Prof'l Conduct 3.3 ("A lawyer shall not knowingly make a false statement of material fact or law to a tribunal."), Md. R. Prof'l Conduct 8.4 ("It is professional misconduct for a lawyer to * * * engage in conduct involving dishonesty, fraud, deceit, or misrepresentation [or] engage in conduct that is prejudicial to the administration of justice."), and Md. R. 2-535 (allowing court to revise the judgment "in case of fraud, mistake, or irregularity"). *See* App. 17a. The district court made similar suggestions of violations. *See* App. 51a-52a.

## CONCLUSION

For the foregoing reasons, the petition should be granted and the judgment below reversed.

Respectfully submitted,

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